

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

SUTTER WEST BAY HOSPITAL d/b/a CALIFORNIA
PACIFIC MEDICAL CENTER

Employer

and

Case 20-UC-076774

INTERNATIONAL UNION OF OPERATING ENGINEERS,
STATIONARY ENGINEERS LOCAL NO. 39

Union

DECISION AND ORDER

Sutter West Bay Hospital d/b/a California Pacific Medical Center (Employer) is engaged in providing medical care at four acute care hospital campuses (herein referred to as St. Luke's, Davies, California and Pacific) located in San Francisco, California. By its petition herein, the Employer seeks to clarify an existing contractual unit of about 70 employees represented by International Union of Operating Engineers, Stationary Engineers Local No. 39 (Union) to exclude chief engineers and assistant chief engineers as statutory supervisors. The Union takes the position that the petition must be dismissed on procedural grounds and because the chief engineers and assistant chief engineers are not statutory supervisors.

For the reasons discussed below, I decline to dismiss the petition on procedural grounds; I find that the chief engineers are statutory supervisors; the assistant chief engineers are not statutory supervisors; and I order the exclusion of the chief engineers from the unit based on their supervisory status. Further, the parties have stipulated, and I

find, that the supervising chief engineer and the director of technical services are also properly excluded from the unit as managerial employees.¹

Witnesses. The following witnesses testified at the hearing, which was held in San Francisco, California, on April 25 and 26, 2012, before Hearing Officer Lucile Rosen: Manager of Labor Relations Kevin Joo; Director of Engineering and Facility Development Tim Hern; Chief Engineers Brian Cassel (Pacific Campus), Donald Haynes (St Luke's campus), and John Kimball (California campus); Assistant Chief Engineer John Groen (Davies campus); and Union District Representative Dan McNulty.

FACTS

Collective-Bargaining History & the Bargaining Unit. The most recent collective-bargaining agreement (Agreement) between the Employer and Union was effective October 1, 2005, through September 30, 2010, and was thereafter extended by the parties subject to cancellation on ten days' notice. The Union gave notice to cancel the Agreement on March 15, 2012. The parties stipulated, and I find, that no collective-bargaining agreement was in effect at the time the instant unit clarification petition was filed.

Under the Agreement, the Employer recognizes the Union as the exclusive collective-bargaining representative of all employees in a unit comprised of chief engineers, assistant chief engineers, stationary engineers, biomedical engineers, chief biomedical electronics technicians, assistant chief biomedical electronics technicians, biomedical electronics technicians, head carpenters, maintenance carpenters, maintenance painters, utility engineers, director technical, director of maintenance, and apprentice employees employed by the Employer at its four San Francisco, California campuses.

Chief engineers and assistant chief engineers have been included in the bargaining unit represented by the Union under successive collective-bargaining agreements with the Employer since 1990. The record establishes that there have been no significant changes

¹ The record includes two agreements by the parties dated in 2001, by which they agreed to exclude these two positions as managerial employees under the Act.

in the responsibilities or duties of the chief engineer or assistant chief engineer position since 1990.

Duties of Bargaining Unit Employees. Employees in the bargaining unit maintain, repair and operate mechanical and electrical systems at all four Employer campuses, including heating, ventilation, air conditioning, electrical, plumbing, medical gases, and generator and boiler systems.

Chief Engineers & Assistant Chief Engineers. Each campus of the Employer has one chief engineer and one assistant chief engineer with the exception of the Davies campus, which has a supervising chief engineer instead of a chief engineer; as indicated above, the supervising chief engineer position is stipulated to be excluded from the unit as a managerial employee.

All chief engineers report directly to the Employer's Director of Engineering and Facility Development, Tim Hern, who oversees the engineering departments on all campuses. Hern's office is located at the Pacific campus near the engineering department. Hern confers with each of the chief engineers in person or by conference call for about one-half hour each week.

The chief engineers are responsible for overseeing the engineering departments and unit employees at their respective campuses. The chief engineer at the St. Luke's campus, Donald Haynes, has held that position since about 2007. Reporting to Haynes are an assistant chief engineer (Devendra Deo) and about eight other unit employees. At the California campus, John Kimball has been the chief engineer since about 2007. Reporting to Kimball are an assistant chief engineer and about 18 other unit employees. At the Pacific campus, Brian Cassel has been chief engineer since about 2008. Reporting to Cassel are Assistant Chief Engineer, William Wong, and about 20 other unit employees. Also located at the Pacific campus is stipulated managerial employee, Director of Technical Services, John Layden. At the Davies campus, reporting to Supervising Chief Engineer Jim Cronin are one assistant chief engineer, John Groen, and about 11 unit employees.

Job Description of Chief Engineer. The job description for the chief engineer position provides that the person in the position has the following duties: to develop and implement policies and procedures for providing engineering services; to monitor service and staff performance; to develop and implement orientation programs for new procedures and/or new personnel; to be responsible for the personnel functions of the department, including hiring, discipline, counseling, succession planning and salary administration; and to seek and retain personnel with the qualifications and competence to support the skill level required and the goals established for the department. The minimum qualifications for the chief engineer position set forth in the job description include five years management and/or supervisory experience of technically skilled staff with at least two of those years preferably having been in the health care industry.

Job Description of Assistant Chief Engineer. The job description of the assistant chief engineer provides that the person in this position: performs mechanical and plumbing repairs as required by the chief engineer; participates in the development and application of standards of quality and productivity for the engineering department; supervises and directs engineering department personnel in the use of policies, procedures and standards of work performance for the maintenance and repair of equipment and building systems; monitors departmental personnel matters and makes recommendations, such as selection, training, promotion, discipline, and termination; administers, monitors supervises and documents the preventative maintenance program to ensure uninterrupted operation of the entire physical plant; supervises the scheduling of department personnel; directs the grievances of employees to the chief engineer for final disposition; and participates in the orientation of new employees and the continuing education of departmental employees in the repair and maintenance of equipment. In addition, the job description provides that on a daily basis, the assistant chief engineer reports to the chief engineer regarding the physical and structural condition of hospital facilities and the status of work in progress; coordinates all fire and safety measures; and maintains tools and equipment as necessary.

Hiring Authority of Chief Engineer. As indicated above, the job description for the chief engineer position includes responsibility for hiring. The performance appraisal for the chief engineer also includes criteria for rating the chief engineer on his or her hiring of department personnel. The most recent Agreement between the parties also states that the chief engineer is in charge of hiring employees in the engineering department, subject to the approval of the administrator or his or her designee.

The testimony of Manager of Labor Relations, Kevin Joo, and Director of Engineering and Facility Development, Tim Hern, is that although the Employer's policies require a higher level manager to approve all hiring decisions made by chief engineers, the chief engineers effectively recommend the hiring of employees in the engineering department for their respective campuses.

The record establishes that that the hiring process works as follows: when a vacancy in a unit position occurs at one of the Employer's campuses, the chief engineer at that campus and Director Hern jointly submit a requisition form to higher management requesting permission to hire. If permission to hire is granted, the Employer's human resources department publishes a position announcement on the Employer's website and notifies the Union of the opening. Job resumes submitted to the human resources department are emailed directly to the chief engineer. According to Hern, he does not review resumes because in his view: "if you have competent supervisors and managers, you should allow them the flexibility to hire the people they want to have working there." The chief engineer and assistant chief engineer jointly review the resumes; decide which candidates to interview; and schedule and conduct the interviews. Hern testified that he has informed the chief engineers that if they want him to participate in interviews, he will do so, but does not consider it necessary. According to Hern, on only one occasion during his four years as director has a chief engineer asked him to participate in a job interview.² With regard to the interview process, Chief Engineer Cassel testified that he

² On that occasion, Chief Engineer Haynes requested Director Hern to participate in the interview of Engineer Devender Deo when Haynes wanted to promote Deo to the position of assistant chief engineer. Haynes participated in the interview and approved Deo's promotion to that position.

had created a test comprised of 50 engineering-type questions that was administered to candidates. According to Cassel, a candidate's inability to answer the questions correctly would end the interview.

After the chief engineer and assistant chief engineer complete the interviews, the assistant chief engineer gives the chief engineer his opinion about the candidates, and the chief engineer decides who to hire. In this regard, Chief Engineer Cassel testified that the assistant chief engineer participates in the hiring interviews at Cassel's discretion, but the final hiring decision is Cassel's. Once the chief engineer decides who to hire, he notifies Director Hern and the human resources department of his decision. Hern testified that he views the chief engineer's selection as the final hiring decision. However, prior to extending an offer of employment, the Employer's human resources department conducts a background check on all candidates; if a candidate passes the background check, then the human resources department makes an offer of employment to the candidate.

Chief Engineer Haynes testified that he has been involved in hiring about a dozen employees and his recommendations to hire have always been approved although some candidates have not been hired because they did not pass the background check. Chief Engineer Kimball similarly testified that he has made the decision to hire approximately six to eight employees, and only on one occasion was his decision not followed because the background check disclosed that a candidate had a criminal record. According to Kimball, on that occasion, he selected another candidate who was hired.

Hiring Authority of Assistant Chief Engineers. As indicated above, the job description for the assistant chief engineer includes references to hiring authority. The performance appraisal for the position also includes the same criteria as does that of the chief engineer with regard to recruiting and selecting individuals to create a highly performing team. The Agreement includes no reference to the position of assistant chief possessing hiring authority as it does with regard to the chief engineer position. The record establishes that assistant chief engineers have participated with chief engineers in reviewing resumes; selecting candidates to interview; and conducting job interviews. Assistant chief engineers have also given their opinions about the candidates being

interviewed to the chief engineer. However, there is no evidence that the assistant chief engineers have made hiring recommendations or that the opinions of candidates that they have expressed to chief engineers have affected the hiring recommendations made by the chief engineers. Chief Engineer Kimball and Assistant Chief Engineer Groen both testified that assistant chief engineers do not possess hiring authority. Chief Engineer Cassel testified that the assistant chief engineer participates in the interview process at Cassel's choice and that Cassel is the person who makes the hiring decision.

Authority of Chief Engineers to Discipline, Suspend and/or Terminate Employees. The job description for the chief engineer includes authority to discipline, and the chief engineer's performance appraisal also includes criteria measuring ability to take appropriate corrective action. The Agreement also provides that the chief engineer has responsibility for discharging employees in the engineering department subject to the approval of the administrator or his or her designee.

The Employer has a progressive disciplinary system and issues corrective disciplinary action notices to document disciplinary actions. These notices indicate whether the employee has received prior notifications and/or disciplines ranging from a first offense notification to an unpaid suspension. The Employer's personnel policies require that all discipline above a documented verbal warning be approved by the next highest level manager above the person issuing the discipline. The corrective action notices also indicate on their face that such approval by higher management is required. In addition, under the Employer's guidelines, the Employer's human resources department is to be consulted on suspension and termination actions. According to Joo, the role of the human resources department is to provide guidance, but the final disciplinary decision is left in the hands of the departmental supervisor or manager. The testimony of Joo and Hern is basically to the effect that subject to this framework, chief engineers and assistant chief engineers are authorized to discipline and/or effectively recommend the disciplining, suspension and termination of engineering employees on their respective campuses.

Documentation in the record of disciplinary actions within the engineering department consists of 12 notices dating from 2005 to 2012. None involve terminations. The names of the employees to whom these notices were issued have been redacted. Only three of the 12 notices are signed by chief engineers, and all three are signed by the same chief engineer, John Kimball. Two of these three notices are verbal warnings for unplanned and/or excessive absences by employees. The record does not indicate if these verbal warnings served as support for further disciplinary action under the Employer's progressive disciplinary system. The third notice is a written warning for inappropriate behavior by an employee; it is signed not only by Kimball but also by Director of Technical Services, Dennis Layden, a stipulated managerial employee. There is no documentation in the record of any suspension or termination actions signed by chief engineers.

Chief Engineer Kimball testified that as chief engineer he has never issued any discipline to an employee other than a verbal warning without first obtaining his supervisor's approval and consulting with human resources. According to Kimball, he has also written a performance improvement plan (PIP) for one employee, but did so with the approval of human resources. Kimball further testified that he has never terminated an employee, but had recommended a termination to human resources. However, there is no evidence demonstrating whether this recommendation was followed.

Chief Engineer Haynes testified that he has never terminated any employee and is not authorized to issue discipline other than a verbal warning without obtaining Director Hern's approval. According to Haynes, he can recommend a PIP, but only with the approval of the human resources department.

Although Chief Engineer Cassel testified generally that he possesses authority to decide whether and how to discipline and/or terminate employees, he further testified that all disciplinary actions above verbal warnings must be approved by Director Hern. According to Cassel, he terminated one employee who had not passed probation and placed another employee on a PIP, but the record shows that in both instances, he had

consulted with Hern and with the human resources department and had obtained their approval for such actions.

Authority of Assistant Chief Engineers to Discipline, Suspend and/or Terminate Employees. As indicated above, the job description for the assistant chief engineer position includes authority to monitor departmental personnel matters and to make recommendations, including for the discipline and termination of employees. The performance appraisal for the assistant chief engineer position also includes an evaluation criterion of taking appropriate corrective action against employees. There is no reference in the Agreement to the assistant chief engineer possessing authority to terminate employees as there is for the chief engineer.

Both Joo and Hern testified that assistant chief engineers possess authority to discipline and terminate employees but that any documented disciplinary action (i.e., disciplinary action beyond an oral counseling) must be approved by a higher level manager and human resources is to be consulted on suspension and termination actions.

Two of the disciplinary notices in the record are documented verbal warnings signed by assistant chief engineers Groen and Haynes,³ for unauthorized absences, use of improper lifting techniques and/or failure to give four hours notice of absence due to illness prior to the start of a shift. A third documented verbal warning, issued for tardiness, is signed by both Assistant Chief Engineer Groen and Supervising Chief Engineer Cronin. (As indicated above, Cronin is stipulated to be a managerial employee). The record also includes two written warning notices for inappropriate behavior and tardiness, which are signed by assistant chief engineers, Groen and Rios, and also by Cronin.

The record also includes four suspension notices signed by assistant chief engineers, one of which is also a final written warning. Three are signed by Haynes when he was an assistant chief engineer; two of these are for an employee sleeping on the job and the other is for an employee working on his car engine during work time. Haynes testified that he had prepared these suspensions at Cronin's direction and two of the

³ This verbal warning was signed by Haynes before he became chief engineer.

notices recite that Cronin personally observed the misconduct. The fourth suspension notice, issued jointly by Cronin and Groen, is to an employee for improperly shutting down a boiler. This notice recites that Cronin personally observed the employee's misconduct.

Assistant Chief Engineer Groen testified that he makes disciplinary recommendations to Cronin and has never issued any discipline other than an oral counseling without obtaining Cronin's approval. According to Groen, anything beyond an oral counseling "comes from the chief." Groen also testified that he had participated in the implementation of a performance improvement plan issued to an employee, but the PIP had been issued and implemented under Cronin's direction after consultation with the director. The record does not show how frequently Groen has made disciplinary recommendations to Cronin or how frequently Cronin has followed such recommendations.

Chief Engineer Kimball testified that during the 15 years (1992-2007), that he worked as an assistant chief engineer for the Employer, he had never issued any form of discipline, even documented verbal warnings, without first obtaining approval of the chief engineer. Kimball further testified that all the documented verbal warnings he had been involved in issuing as assistant chief engineer were for relatively minor offenses, such as employees calling in sick too much. According to Kimball, on one occasion he had also reported to the chief engineer that an employee should not pass probation because of the employee's racism, but Kimball testified that he did not make the decision to terminate the employee.

Chief Engineer Cassel testified that in 2008, at a time when he was assistant chief engineer and there was no chief engineer, he and the director terminated an employee for being incompetent, and the human resources department was also involved in the investigation and termination. Cassel further testified that his assistant chief engineer participates in termination decisions made by Cassel as chief engineer, but it is Cassel who ultimately makes the decision.

Evaluations. Chief engineers fill out evaluations on assistant chief engineers as well as on other unit employees at their respective campuses. Hern testified that he must review the evaluations of assistant chief engineers prepared by chief engineers, but he did not recall ever making any changes on them. The chief engineers are evaluated by Hern.

Promotions. As indicated above, the job description for the chief engineer includes authority to handle personnel functions for the engineering department and the job description for the assistant chief engineer includes authority to recommend promotions. The appraisal for both positions includes a criterion measuring what is termed “complementary action.”

Director Hern testified that chief engineers and assistant chief engineers possess independent authority to promote employees and that chief engineers had promoted employees into the position of assistant chief engineer without Hern’s authorization or approval. However, the record contains conflicting evidence in this regard. Thus, although Hern testified he did not authorize or approve Devender Deo’s promotion by Chief Engineer Haynes to the position of assistant chief engineer, Haynes testified that he had obtained Hern’s approval for Deo’s promotion. Both Hern and Chief Engineer Cassel testified that Hern had participated and approved of engineer Will Wong’s promotion to assistant chief engineer. In addition, Chief Engineer Cassel testified that his promotion to assistant chief engineer in 2005 had been approved by both his chief engineer and by Technical Director Layden, a stipulated managerial employee. The record includes no specific examples of assistant chief engineers being involved in the promotion of other employees.

Assignment of Shifts, Work Locations & Vacation Schedules. Shifts, work locations and vacations of employees are assigned by seniority utilizing a bid system under the Agreement. Chief engineers and assistant chief engineers only facilitate such assignments under the terms of the Agreement.

Assignment & Direction of Work. The job description of the chief engineer indicates that the chief is responsible for determining employees’ duties. The job description for the assistant chief engineer indicates that the assistant is responsible for

scheduling maintenance repair work and scheduling departmental personnel. The appraisals for both the chief engineer and assistant chief engineer include the following evaluation criterion:

Organizes work, processes, projects, people, and resources. Manages scope, priorities and timelines. Carries out plans in a safe and effective manner. Monitors and makes adjustments, including any required objectives and action plans to maintain focus on dashboard/pillar or other performance measurement goals.

Hern testified that most of the work performed by the engineering department is preventative maintenance work performed according to periodic (weekly, monthly or annual) schedules. Such work is distributed to employees by the chief engineer and assistant chief engineer as dictated by the preventative maintenance schedule. Daily work orders also come into the engineering department from the Employer's central service center, where managers of other departments send repair requests, as well as coming in directly from managers. Chief Engineer Cassel testified that he receives about 250 preventative maintenance orders a month and about 35 to 50 daily work orders, which he and the assistant chief engineer assign to employees. Assistant Chief Groen testified that he assists the chief engineer in assigning work but mostly assignments are made by the chief engineer.

The testimony of the chief and assistant chief engineers establishes that assignment of work to employees is based on several factors, including: when the work can be done;⁴ where it is to be done;⁵ who possesses the skills needed to do the work; who is available; and whether an employee needs to learn the type of work being performed, in which case an engineer may be assigned to a job in order to learn the work by watching another engineer perform it.

⁴ For example, Kimball testified that if the work must be done at night in order to avoid disrupting patient care, then it will be assigned to employees on the night shift.

⁵ In this regard, Kimball testified that at the California campus, one engineer is assigned to the west end; one to the east end; and another to satellite buildings, and they each handle work in their respective areas unless there is a backlog of work orders in one area, in which case the chief and assistant chief engineer distribute the overflow work until the backlog is eliminated.

According to Cassel, he and the assistant chief engineer also monitor preventative maintenance work to ensure that employees are actually doing the work. Cassel testified that if he finds out that an employee is not doing the work, he will orally counsel the employee. The disciplinary authority of the chief engineer and assistant chief engineer is discussed above. Director Hern testified that if he receives any complaints about an engineering matter from other Employer departments, he directs them to the chief engineer.

Time Off, Sick Leave & Time Cards. The job description for the chief engineer position does not include any specific reference to scheduling or handling time off or time cards for department personnel; however, the job description for the assistant chief engineer does include responsibility for supervising the scheduling of department personnel. The appraisals of the chief engineer and assistant chief engineer do not contain criteria specifically relating to scheduling of employees, time off or handling of time cards.

The record establishes that supervising chief engineers, chief engineers and assistant chief engineers are all involved in deciding time off requests. Director Hern is not involved in this process. Chief Engineer Haynes testified that he approves time off if there is good coverage and he and the assistant chief jointly agree to do so. Chief Engineer Cassel testified that while the assistant chief is authorized to grant or deny time off requests, in practice the requests are brought to Cassel and he makes the final decision, usually agreeing with the assistant chief's recommendation. However, Cassel testified that he will deny such requests if coverage is "thin." According to Chief Engineer Kimball, he requests a week's notice for time off requests and has been doing scheduling for such a long time that he knows "how to work everything around for minimal disruption to the crew and everything."

The record evidence indicates that most time off requests are granted. The primary considerations in deciding such requests are whether the employee making the request has given a week's advance notice and whether there is adequate coverage. Chief

Engineer Cassel testified that the assistant chief engineer keeps a notebook of time off requests and plugs in one of two vacation relief persons when an employee is off work.

The record contains a 2007 memo by Cronin and then assistant chief engineer Haynes granting an employee's request for time off, although warning the employee that seven days advance notice is generally required. The record also contains five time off request forms dated from 2010 to 2012, all from the Pacific campus; one signed by Chief Engineer Cassel, and the others signed by Assistant Chief Engineer Wong. Three of these requests were approved and two were denied. The two denied have handwritten entries indicating that one was denied because of lack of shift coverage, and the other was denied due to the days off requested having already been granted to other employees.

The record also establishes that chief engineers approve time cards for employees and correct errors made by employees in clocking in and out. Chief engineers can also make adjustments to time cards if an employee needs to take a different break time than is customary. If employees are sick, they must notify the chief engineer if available and the assistant chief engineer if the chief is not available.

Overtime. Overtime is assigned based on seniority under the terms of the Agreement. However, Chief Engineer Cassel testified that in practice there are typically only one or two employees who actually want to work overtime, and they are not usually the most senior employees, and he has discretion to decide which of them will work available overtime.

Resolution of Grievances. Although the job description of the assistant chief engineer indicates that the assistant chief engineer directs grievances of employees to the chief engineer for final disposition, the record includes no evidence showing that chief engineers or assistant chief engineers are involved in resolving employee grievances.⁶

⁶ In this regard, Chief Engineer Kimball testified that employees sometimes bring their grievances to him and he talks to the Union, but does not participate in reaching a resolution of grievances on behalf of the Employer.

Transfers, Layoffs and Recalls. Chief engineers and assistant chief engineers are not involved in transfer, layoff or recall decisions, which are governed by seniority under the terms of the Agreement.

Working With the Tools of Trade. Chief engineers only occasionally work with their tools performing the same work as engineers in the unit. Assistant chief engineers spend about half their work time working with the tools of the trade.

Hours, Pay Rates and Other Terms and Conditions of Employment. The engineering department employees work on three shifts covering engineering work 24 hours a day, seven days a week; chief engineers and assistant chief engineers generally work 7:30 a.m. to 3:30 or 4 p.m. Chief engineers rarely work with the tools of the trade and assistant chief engineers spend about 50% of their work time working with the tools of the trade. The pay rates of the chief engineers and assistant chief engineers are set forth in the Agreement, which provides that chief engineers are paid not less than 25% in excess and assistant chief engineers not less than 12 1/2 % in excess of the salary of stationary engineers. The appraisals for the chief engineers and assistant chief engineers differ from those of other employees in that they are based not only on their job descriptions, but also on individual and organizational performance objectives. As indicated above, the chief engineer is appraised by Director Hern. Unlike other employees, the chief engineer and assistant chief engineer are eligible to earn management incentive bonuses. However, the record does not include specific evidence to establish that a chief engineer or assistant chief engineer has actually received such a bonus. Vacation leave and time off requests for the chief engineer and assistant chief engineer are also treated differently from those of other employees in that Hern must approve such requests and only one or the other can be away from work at a time.

Unlike other employees, chief engineers and assistant chief engineers have their own private offices equipped with computers. They wear uniforms similar to those worn by other engineering department employees and also use similar protective footwear and goggles as necessary. Chief engineers and assistant chief engineers also attend

management/supervisor training classes and supervisory meetings not attended by unit employees.

ANALYSIS

Whether the Petition Must Be Dismissed on Procedural Grounds. The Union contends that the petition must be dismissed because the parties have an established practice over many years of collective-bargaining of including chief engineers and assistant chief engineers in the bargaining unit, and the Employer has not shown compelling circumstances for disregarding bargaining history. The Employer takes a contrary view.

The Board has held that where a unit clarification petition is timely filed disputing the supervisory status of a unit classification, the petition may be processed even though the disputed classification has been historically included in the unit and the duties of the position have remained unchanged. Contrary to the Union's argument, there is no requirement that "compelling circumstances" be shown in order to process such a petition. See *Goddard Riverside Community Center*, 351 NLRB 1234, 1235 (2007); *Bethlehem Steel Corp.*, 329 NLRB 243, 244 fn 5 (1999); *Washington Post Co.*, 254 NLRB 168, 169 (1981). Here, the Employer's petition was timely filed after the expiration of the Agreement. There is no basis for dismissing the petition based on the argument raised by the Union. In reaching this conclusion, I have considered the cases relied upon by the Union, but I do not find them to be controlling.⁷ Accordingly, I decline to dismiss the petition on this basis.

Whether the Chief Engineers and Assistant Chief Engineers are Statutory Supervisors. The Employer contends that the chief engineers and assistant chief engineers are statutory supervisors who should be excluded from the unit and the Union takes a contrary view.

⁷ The Union relies on *CitiSteel USA, Inc.*, 312 NLRB 815, 816 (1993); *Rock-Tenn Co.*, 274 NLRB 772, 773 (1983); *Indianapolis Mack Sales & Service*, 288 NLRB 1223 (1988); *Union Electric Co.*, 217 NLRB 666 (1975); *Columbia Gas Transmission*, 213 NLRB 111 (1974); and *Peerless Publications, Inc.*, 190 NLRB 658 (1971).

The term “supervisor” is defined in Section 2(11) of the Act as:

[A]ny individual having authority, in the interest of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Pursuant to this definition, individuals are statutory supervisors if they hold the authority to engage in any one of the twelve supervisory functions listed in Section 2(11); their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;” and, their authority is held “in the interest of the employer.” *Oakwood Healthcare, Inc.*, 348 NLRB at 686, 687 (2006), quoting *Kentucky River Community Care*, 532 U.S. 706, 713 (2001). Supervisory status may be shown by demonstrating that a putative supervisor has the authority either to perform a supervisory function or to effectively recommend the same. See *Oakwood Healthcare, Inc.*, *supra*; *Croft Metals, Inc.*, 348 NLRB 717 (2006); *Beverly Enterprises-Minnesota, Inc. d/b/a Golden Crest Healthcare Center*, 348 NLRB 747 (2006) .

Whether an individual is a supervisor is to be determined in light of the individual’s actual authority, responsibility and relationship to management. See *Phillips v. Kennedy*, 542 F.2d 52, 55 (8th Cir. 1976). The Act requires “evidence of actual supervisory authority visibly demonstrated by tangible examples to establish the existence of such authority.” *Oil Workers v. NLRB*, 445 F.2d 237, 243 (D.C.Cir. 1971); *Chevron, USA*, 309 NLRB 59, 62 (1992). Mere conclusory statements, without such supporting evidence, are not sufficient to establish supervisory authority. *Chevron, supra*; *Sears Roebuck & Co.*, 304 NLRB 193 (1991). Although “[a] supervisor may have potential powers, ... theoretical or paper power will not suffice. Tables of organization and job descriptions do not vest powers.” *Oil Workers v. NLRB*, *supra*, 445 F.2d at 243, quoting *NLRB v. Security Guard Service*, 384 F.2d 143, 149 (5th Cir. 1967). Accord: *Chevron USA, supra*, 309 NLRB at 62; *St. Alphonsus Hospital*, 261 NLRB 620, 630-631 (1982).

Finally, the burden to prove supervisory status is on the party asserting it. See *Oakwood, supra*; *Williamette Industries, Inc.*, 336 NLRB 743 (2001); *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 fn. 8 (1999).

In the instant case, the record establishes that the chief engineers are statutory supervisors based on their authority to effectively recommend the hiring of employees. The testimony of witnesses Joo, Hern, Haynes, Cassel and Kimball all support this conclusion. Chief engineers review resumes; select candidates for interview; and interview the candidates they have selected. Director Hern does not review resumes and testified that he only participates in interviews when he is requested to do so by a chief engineer. Further, the record shows that Hern has participated in only one interview since he became director in 2008, and that was not a hiring interview.⁸ Chief engineers make their hiring recommendations to Hern, and Hern treats their recommendations as final hiring decisions and does not overturn them. The testimony of Chief Engineers Haynes, Cassel and Kimball is consistent with Hern's testimony that their hiring recommendations are followed. The only occasions when their recommended candidates have not been hired are when a background check renders an applicant unsuitable for hire. I do not find that such evidence renders the hiring recommendations of the chief engineers ineffective given the evidence that chief engineers are the highest-ranking individuals involved in reviewing resumes, selecting candidates to interview, and in make hiring recommendations, and given that such recommendations have been followed on almost all occasions. Furthermore, the evidence shows that at least on one occasion when a recommended candidate was rejected due to a background check, the chief engineer chose another candidate who was hired.

Based on the evidence establishing that chief engineers possess authority to effectively recommend the hiring of employees, I find that they are statutory supervisors. Because Section 2(11) of the Act is read in the disjunctive and possession of any one of the indicia listed therein is sufficient to establish supervisory authority, I find it

⁸ The interview that Hern participated in was not an initial hiring interview but was for the promotion of engineer Devender Deo to the position of assistant chief engineer.

unnecessary to address whether the chief engineers possess any other of the supervisory indicia set forth in Section 2(11).

Accordingly, I find that the chief engineers are statutory supervisors and they are excluded from the unit.

Assistant Chief Engineers. In contrast to the evidence establishing the hiring authority of the chief engineers, the record evidence does not support the conclusion that the assistant chief engineers possess authority to hire or to effectively recommend the hiring of employees. Although assistant chief engineers have participated with chief engineers in selecting candidates to interview, in interviewing candidates, and in giving their opinions of candidates to the chief engineers, there is no evidence to establish that their opinions have amounted to effective recommendations to hire.

Nor does the record show that assistant chief engineers possess any other types of Section 2(11) authority. Thus, the evidence is clear that assistant chief engineers possess no authority to transfer, lay off, recall, or adjust the grievances of other employees.

With regard to the involvement of assistant chief engineers in disciplining and terminating employees, the record evidence does not support that assistant chief engineers have independently made such decisions or effectively recommended them. Thus, the evidence shows that any documented discipline requires approval of the chief engineer and/or other higher level manager and, in the case of suspensions and terminations, consultation with the human resources department. Although the record evidence shows that assistant chief engineers have been involved in the issuance of written disciplines, suspensions, PIPs and terminations, it also shows that these actions were initiated and/or decided by higher level supervisors and/or in consultation with the human resources department. The record does not establish whether and/or how frequently disciplinary recommendations made by assistant chief engineers have been followed by higher level managers. Indeed, the testimony of Groen, Kimball and Casell is to the effect that assistant chief engineers lack authority to discipline and that it is other higher level supervisors who are in control of discipline and termination decisions. To the extent assistant chief engineers orally counsel or report misconduct to higher level supervisors, it

is well established that such actions are insufficient, standing alone, to establish supervisory authority even when an employer utilizes progressive disciplinary policies, as does the Employer. See *Northcrest Nursing Home*, 313 NLRB 491, 497 (1993); *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 392 (1989). Rather, there must be evidence to show that an oral counseling supported further discipline or that a report of misconduct amounted not only to a report, but also an effective recommendation for disciplinary action. *Northcrest*, *supra* at 497.⁹ Such evidence is absent from the record herein. Accordingly, I do not find that the Employer has carried its burden to establish that the assistant chief engineers are statutory supervisors based on their authority to discipline or to terminate employees or to effectively recommend such actions.

Nor does the record establish that the assistant chief engineers reward or promote or effectively recommend the reward or promotion of employees. Thus, the only evidence with regard to rewards or promotions relates to the involvement of chief engineers in the promotion of assistant chief engineers.

With regard to the authority to assign, the record is clear that assistant chief engineers do not assign shifts, work locations or vacation schedules, as such assignments are controlled by the Agreement. Nor is there evidence that they “assign” work in terms of giving employees significant overall duties as opposed to discrete tasks. See *Oakwood*, *supra* at 689. Thus, the record supports that the assistant chief engineers merely assist the chief engineers in making work assignments. Moreover, the record does not establish that the assignment of work is based on anything more than routine decision-making, where the record shows that work assignments are largely dictated by when and where the job must be performed and who is available that possesses the necessary skill to do it. Given that the engineering department on each campus operates

⁹ Thus, in *Northcrest*, *supra* at 497, 506-507, the Board decided that warnings given by charge nurses were merely reportorial and not supervisory because they did not lead to personnel action, or if they did, such action was not taken without independent investigation or review by others. The Board in *Northcrest* observed that although the Employer had policies regarding progressive discipline, it had not established that such policies were so strictly adhered to that a certain number of warnings automatically resulted in further more severe discipline being administered. Similarly, in the instant case, the Employer has not established that its disciplinary system is enforced in such a formulaic manner.

with 20 or fewer engineers who work three shifts covering 24 hours a day, seven days a week, it is apparent that the choice of who will do what jobs is necessarily limited. In sum, I do not find that the record establishes that the assistant chief engineers are statutory supervisors based on their authority to assign under Section 2(11). *Id.* at 693.

Nor do I find that the record evidence supports that the assistant chief engineers are statutory supervisors based on their authority to responsibly direct the work of other employees. Thus, even assuming that they exercise the authority to direct with independent judgment, there is no evidence that they have been held accountable for their direction of the work of other engineers. *Id.* at 691-692.

With regard to authority to decide time off requests, the record evidence reveals that the chief engineer plays an overlapping, and at least in some cases, dominant role over the assistant chief engineer in deciding such requests. Thus, the record includes only four time off requests approved solely by an assistant chief engineer and all four were approved by the same assistant chief engineer, William Wong. Cassel is Wong's chief engineer and Cassel testified that all time off requests are brought to him and he makes the ultimate decisions. According to Cassel, although he usually goes along with what the assistant chief has decided, he has denied time off requests if coverage was "thin." Moreover, most time off requests are granted and there appear to be only two reasons for the denial of such requests: coverage is inadequate or required advance notice has not been provided by the employee making the request. Based on such evidence, the decision to grant or deny such requests appears to involve only routine decision-making, and not the exercise of discretion and independent judgment required under Section 2(11) of the Act. Under such circumstances, I do not find that possession of such authority by the assistant chief engineers constitutes supervisory authority within the meaning of the Act. See *Hydro Conduit Corp.*, 254 NLRB 433, 439 (1981).

Further, with regard to whether assistant chief engineers possess authority to responsibly direct the work of other employees, as indicated above, the record does not establish that the assistant chief engineer possesses authority to take corrective disciplinary action against employees or that assistant chief engineers have actually been

held accountable for the work of other employees in their department. Thus, while criteria in the appraisal and the potential for incentive bonuses may suggest that such accountability exists, in the absence of tangible supporting evidence, the Employer has shown only paper accountability, which is insufficient to establish supervisory authority. See *Oakwood*, *supra*, 348 NLRB at 689; *Golden Crest Healthcare Center*, *supra*, 348 NLRB at 727.

Lastly, in the absence of evidence establishing that the assistant chief engineers possess one of the Section 2(11) indicia of supervisory authority, I do not find that the evidence of secondary indicia, such as their higher pay rate, having an office, or their attendance at supervisory meetings or trainings, establishes that they are supervisors under Section 2(11) of the Act. See *Training School at Vineland*, 332 NLRB 1412 (2000).

For all the reasons discussed above, I do not find that the Employer has met its burden to establish that the assistant chief engineers are statutory supervisors, and I decline to exclude them from the unit.

In conclusion, I find that the chief engineers are statutory supervisors who are properly excluded from the unit and that the assistant chief engineers are not statutory supervisors and are not excluded from the unit. The parties have stipulated, and I also find, that the supervising chief engineer and the director of technical services are managerial employees who are excluded from the unit.

CONCLUSIONS AND FINDINGS

Based on the entire record in this proceeding and in accordance with the discussion above, I conclude and find as follows:

- 1) The Hearing Officer's rulings made at the hearing are free from prejudicial error and are affirmed.
- 2) The Employer is an employer as defined in Section 2(2) and 2(14) of the Act, and is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction in this case.
- 3) The Union is a labor organization within the meaning of the Act.

4) The parties have stipulated, and I find, that the supervising chief engineer and the director of technical services, are managerial employees who are properly excluded from the unit. Further, I find that the chief engineers are statutory supervisors within the meaning of Section 2(11) of the Act and are properly excluded from the existing bargaining unit and that the assistant chief engineers are not statutory supervisors and are not excluded from the unit.

ORDER

I hereby order that the individuals in the position of supervising chief engineer and director of technical services are excluded from the unit as managerial employees; the individuals in the position chief engineer are excluded from the unit as statutory supervisors; and the individuals in the position of assistant chief engineer are not excluded from the unit.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Order may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **June 12, 2012**. The request may be filed electronically through the Agency's web site, www.nlrb.gov,¹⁰ but may not be filed by facsimile.

DATED AT San Francisco, California, this 29th day of May 2012.



Joseph F. Frankl, Regional Director
National Labor Relations Board, Region 20
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¹⁰ To file the request for review electronically, go to www.nlrb.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.